

BEFORE THE ALASKA COMMISSIONER OF NATURAL RESOURCES

CASTLE MOUNTAIN COALITION, COOK)
INLETKEEPER, ALASKA CENTER FOR)
THE ENVIRONMENT, COMMUNITY)
ACTION ON TOXICS, ALASKA CHAPTER)
OF THE SIERRA CLUB, and CHICKALOON)
VILLAGE TRADITIONAL COUNCIL,)

Requestors,)

v.)

DIVISION OF MINING, LAND and WATER,)
ALASKA DEPARTMENT OF NATURAL)
RESOURCES,)

Regulatory Agency,)

ALASKA MENTAL HEALTH TRUST,)
TRUST LAND OFFICE,)

Land Owner, and)

USIBELLI COAL MINE, INC.,)

Permittee.)

In re: Division of Mining Land and
Water's Renewal of Wishbone Hill
Coal Mining Permit Nos.01-89-796
and 02-89-796

RECOMMENDED DECISION

I. Introduction

Requestors challenge the Division of Mining, Land and Water's approval of Usibelli's renewals for two coal mining permits. They ask that the Commissioner of Natural Resources "revoke," "reopen," "reverse" or "withdraw" the division's decision. They argue that the permits terminated automatically, years earlier, and could not be renewed. The permits have not

terminated. The action sought by Usibelli and taken by the division was properly a renewal of existing permits, not a new permitting action.

Alternatively, requestors argue that if a renewal is the proper regulatory action, the division should not have approved the renewal request because the permits “do not meet performance standards.”¹ As opponents of the renewal, requestors bear the burden to prove that the permits should not be renewed. They did not meet that burden.

As an individual requestor, Chickaloon Village Traditional Council raised and separately briefed concerns about a pending instream flow reservation application and government-to-government consultation. Though tribal consultation and water rights are important matters, they are not a basis for denying surface coal mining permit renewals.

Absent proof by the requestors that the renewals should be denied for one of a few specific reasons, the renewals cannot be denied. A coal mine permittee has a statutory right of successive renewal. In this appeal, the requestors have persistently sought to have these permit renewals treated as if they were new applications for which permitting would have to start from scratch, ignoring the past, and (it seems) the current condition of the mine site. That is not a proper approach to renewing permits for existing mines with valid permits. The Commissioner of Natural Resources should affirm the Division of Mining, Land and Water’s October 3, 2014 approval of Usibelli’s renewals.

¹ December 22, 2014 Requestors’ Corrected Opening Brief at p. 24. (and adjacent pages, illustrating requestors’ concerns about hydrologic balance, groundwater and fisheries protection).

II. Facts

In 2010, Usibelli commenced operation of a surface coal mine at Wishbone Hill under permits issued to the company's predecessor in 1991. The permits were renewed from time to time, but the mine was not operated until 2010, after Usibelli took over.

When the permits came up for their most recent renewal in 2011, Usibelli filed a request for a renewal, not an application for new permits. The division conducted a review process that included updating information in the existing permit application files, holding several public meetings, and ultimately issuing an approval imposing new/revised stipulations on Usibelli's operation.² Many of the findings and stipulations concern water quality and quantity.³ The public comment period was extended by 32 days.⁴

The division issued the approval decision on October 3, 2014. It provided notice of the right to appeal to the commissioner within 30 days. On November 3, 2014, a group of five organizations (Castle Mountain Coalition, Cook Inletkeeper, Alaska Center for the Environment, Community Action of Toxic, and Alaska Chapter of the Sierra Club) filed an appeal. Chickaloon Village Traditional Council filed a separate appeal. The requestor group and Chickaloon agreed to combine their appeals into a single action for hearing purposes and requested a hearing on the record and written briefs, with no oral proceeding. They retained separate counsel and prepared separate briefs, but Chickaloon also adopted the Castle Mountain group's brief on the merits. The Alaska Mental Health Trust (land owner) and Usibelli (permittee), and the division agreed to this process.

² October 3, 2014 Wishbone Hill Mine Permit Renewal, Decision and Findings of Compliance at pp. 12-13 (Stipulation) & 14 (approval).

³ *See generally id.*

⁴ *Id. at p. 3.*

The parties, through stipulations and motions, put the matter on a longer track than first contemplated. Assembling the 10,000 plus page record, correcting it and supplementing it, together with extending the briefing time, led to the requestors' reply briefs coming due in late January.

On February 5, the division filed a motion seeking leave to file a sur-reply on the subject of "major revisions" to permits.⁵ The requestors opposed the motion; Usibelli did not. In its opposition, the Castle Mountain requestor group pointed out where specifically in its opening brief it had raised the subject of "major revisions." Though it was not a key point in the requestors' arguments as a whole, the division had sufficient notice of the subject to have addressed it in the division's opposition brief. The motion to file the "major revisions" sur-reply lodged on February 5 is DENIED.

III. Discussion

A. The Permits Did Not Terminate Automatically

Permits usually are issued for five-year terms, but "the commissioner may grant a permit for a longer term" under certain circumstances.⁶ Whether the initial term is five years or something longer, the permittee may lose the permit if operations have not begun within three years. AS 27.21.070(b) provides, in pertinent part,

A permit terminates if a permittee does not begin surface coal mining operations under the permit within three years after the permit is issued. The commissioner may grant reasonable extensions of time if the permittee shows that the extensions are necessary (1) because of litigation that precludes the commencement of the

⁵ February 5, 2015 Motion to File Sur-Reply, at p. 1.

⁶ AS 27.21.070(a). "[I]f the application is complete for that longer term and the applicant demonstrates that the longer term is necessary to allow the applicant to obtain financing for equipment or for the opening of the operation[,]" the longer term can be approved.

operation or threatens substantial economic loss to the permittee; or (2) for reasons beyond the control and without the fault or negligence of the permittee.

The requestors' incorrect interpretation of this statute drives their assertion that Usibelli's permits are invalid and cannot be renewed.

Requestors read this Alaska statute differently than its language supports, especially when taken in context. They assert that the beginning language must be read "a permit terminates automatically."⁷ Based on their interpretation of the federal-equivalent statute, which uses the expression "shall terminate" instead of "terminates," the requestors argue at length and with admirable thoroughness what "shall" does to the reading of the statute. This is to no useful end, however; the phrases mean the same thing as in the federal statute, with Alaska's "terminates" being the clearer—less capable of creating an ambiguity. Use of "shall" not only raises the mandatory versus precatory question but also in some context is merely predictive of what "shall" happen in the future if certain condition occur.

Under Alaska's rules of statutory construction, rarely would a plain meaning interpretation of a one or two word phrase be determinative of meaning for the statute. One has to look at a disputed phrase in context with the other words the drafters and enactors used, as well as legislative purpose and history.⁸ The word "automatically" does not appear as a modifier of "terminates" in the Alaska statute. The parallel federal statute does not say "shall automatically terminate." Requestors did submit an excerpt from the Congressional Record suggesting that some degree of automatic-ness was intended by the federal drafters. That was not expressed in the

⁷ *Emphasis added.* Sometimes the briefs speak of terminating "by operation of law" but with the same connotation as "automatically" brings.

⁸ *See, e.g., State v. Alyeska Pipeline Service Company*, 262 P.3d 593, 597 & n. 27 (Alaska 2011) (explaining courts "look to the plain meaning of the statute, the legislative purpose, and the intent of the statute[.]" but they do not do so mechanically; also *Estate of Kim v. Coxe & United States*, Slip Op. S-14077, p. 7 (Alaska Feb. 22, 2013).

law itself, and it easily could have been. Likewise, the Alaska legislature could have included the word “automatically” when it enacted Alaska’s surface coal mining statute, if it wanted that concept in the statute, or if it feared loss of federal Office of Surface Mining approval of Alaska’s program without such language, even though Congress left it out of the federal statute.

To obtain federal authority to operate the surface coal mining program in Alaska, the state’s statutes had to be consistent with, but not identical to, analogous federal statutes. AS 27.21.070(b) received federal approval years ago without the state being required to add “automatically” to “terminates.” That approval was reinforced recently by a federal Office of Surface Mining determination that the division’s interpretation “is consistent with both the approved Alaska regulatory program and with the Federal regulation and that it is no less stringent than section 506(c) of SMCRA.”⁹

This is not an interpretation of a statute with the “if X, then Y, period, nothing further” type. It is an “if A, then B, unless C” type, and here “C” argues against the requestors terminates-automatically interpretation. The statute really says that if the permittee has not made it to operations in three years, the permit terminates, unless the commissioner has or does grant an extension. The statute establishes standards for granting an extension. Questions of fact, such as, have three years passed since permit issuance and have operation not commenced, will need to be addressed before termination can reasonably be effective. In some circumstances, notices might be required, or a hearing opportunity if the permittee does not agree with the assertion that it has

⁹ November 4, 2014 Letter to Kirkham of the Division from Postle of Office of Surface Mining Reclamation and Enforcement at p. 18. Mr. Postle was responding to complaints from these requestors to the effect that the division was not in program compliance because it was treating the Wishbone Hill permits as valid for renewal purposes.

not achieved operating status. The land owner may need an opportunity to take an action to preserve the property from waste that cannot be taken under an automatically invalid permit.

The division correctly interpreted AS 27.21.070 as not automatically terminating the permits. No action has been taken to invalidate Usibelli's permits. The division's decision to proceed with the renewals should be affirmed.

Recommendation: The commissioner should adopt the conclusion that Usibelli's permits were and are valid, and affirm the division's decision to go forward with the renewal.

B. Requestors Did Not Prove the Permits Should not be Renewed

Requestors argue that even if the Wishbone Hill permits remained valid at the time of the renewal request, they should not be renewed because the operation does not meet certain performance standards. Failure to meet applicable performance standards can be a basis for denying a renewal or requiring permit revisions prior to approval, but the burden of proof rests with the renewal opponent. Here, the key question is whether the requestors met their burden of proof.

AS 27.21.080(a) states that "[a] permit issued under [chapter 21] includes the right of successive renewal upon expiration, for areas within the boundaries of the permit area. An opponent of renewal of the permit has the burden of proving that the permit should not be renewed." The commissioner cannot deny the renewal request unless he finds the following:

Subject to (c) of this section, if a permittee applies for renewal of the permit, the commissioner shall renew the permit after public notice is given in the manner provided in AS 27.21.130 unless the commissioner finds, in writing, that

(1) the terms and conditions of the permit have not been satisfactorily met, and the permittee has not demonstrated to the satisfaction of the commissioner that the

permittee is meeting and will continue to meet a schedule set by the commissioner under AS 27.21.240(a) or (b) for correcting a permit violation;

(2) the surface coal mining and reclamation operation of the permittee is not in compliance with the environmental protection standards of this chapter and regulations adopted under it;

(3) the requested renewal substantially jeopardizes the permittee's continuing responsibility on existing permit areas;

(4) the permittee has not either

(A) provided sufficient evidence that the performance bond under AS 27.21.160 in effect for the operation will continue for the renewal period requested in the application, and that any additional bond required by the commissioner under AS 27.21.160 will be obtained; or

(B) when seeking to use the statewide bonding pool for mining operations established under AS 27.19.040 (b), complied with all requirements of the bonding pool; or

(5) information required by the commissioner in accordance with this chapter has not been provided by the permittee.^[10]

The requestors rely on (2), the commissioner's authority to deny Usibelli's request if its operation "is not in compliance with the environmental protection standards of [AS title 27, chapter 21] and regulations adopted under it."¹¹ They focus on water quality and quantity, and fish as their primary concerns. Possible impacts on Moose Creek are especially concerning.

The difficulty of requestors' position is that this is a renewal, not a new mine application, and they must prove the permit should not be renewed. Not a simple matter of, for instance, questioning whether a proposed diversion of water from Buffalo Creek could impact flow in Moose Creek so much that environmental protection standards might not be met. The

¹⁰ AS 27.21.080(b).

¹¹ AS 27.21.080(b). The regulations are in an adopted but unpublished chapter of the Alaska Administrative Code—11 AAC 90—which can be found on the department's webpage.

commissioner's authority to deny renewal of existing permits requires a finding that the operation "is not in compliance," not supposition about whether it will not be in the future. When, as here, the burden of proving non-compliance falls to the opponent of permit renewal, that opponent needs to do more than raise questions for the division to sort out.

That may have been fine during the public comment and review process—to raise questions and leave it to the division to reconcile all the comments, old and new information about the mine, and so forth, and to modify or add permit stipulations as needed. In fact, that is what the division did—addressing concerns raised by the renewal request, for example, by requiring more monitoring wells and enhanced sampling for the Moose Creek area. Now, however, on appeal to the commissioner, they needed to prove that Usibelli is out of compliance with environmental protection standards. This they did not do.

Requestors relied heavily on two technical reports short-referenced: Myers and Woody. The Woody report is an undated document titled "Wishbone Hill: Review of the Adequacy of Fish and Aquatic Resource Baseline Surveys for Monitoring," and was authored by Dr. Carol Woody from the Center for Science in Public Participation.¹² As the title suggests, it is a critique of data apparently used or to be used as baseline data in developing aquatic monitoring for the Wishbone Hill mine site. Dr. Woody reviewed studies reporting on surveys (like fish densities and spawning habitat) and commented on their value or lack thereof as baseline for the mine's aquatic monitoring. Her criticisms included age of some of the surveys, compatibility of collection techniques and locations then and now, and others.

¹² Attachment 2 to December 3, 2014 reply brief filed by Chickaloon.

Ultimately, Dr. Woody concluded that the aquatic resource studies she reviewed were insufficient. In particular, she wrote (at pages 9-10):

Data presented are not scientifically defensible and do not allow for any future scientific comparisons for before-after effects. Conclusions drawn from the existing data regarding proportion that the Moose Creek Chinook salmon run comprises of Cook Inlet total run are not valid. Conclusions drawn on the existing rearing salmonid densities are statistically biased underestimates of actual fish densities and are untenable. Habitat data collected in 1988 are insufficient to determine whether or not future mining induced changes occur.

Certainly, whenever she wrote this, Dr. Woody was unimpressed by the use or possible use of some survey data as baseline for monitoring at the mine site. Requestors, however, have not shown that questionable baseline equals current non-compliance with an environmental performance standard, particularly when Usibelli has added and revised monitoring requirements during this renewal process.¹³

The situation is similar with the Myers report: useful information for the division to consider but not proof of failure to comply with environmental performance standards. The “Technical Memorandum Impact Analysis: Wishbone Hill Water Right Application date March 14, 2013) report by Tom Myers, Ph.D., was prepared specifically to support Chickaloon’s application for an instream flow reservation for Moose Creek.¹⁴ The Myers report provides data and observations that will no doubt be useful to the division’s water section when it resolves water rights issues for Moose Creek.

Some of the data might be useful at the mine for water management operations. But no matter how much useful data the report provides, it does not prove current non-compliance. Dr.

¹³ October 3, 2014 Decision and Findings of Compliance at p. 3-4 (describing new monitoring wells and additional groundwater sampling).

¹⁴ Attachment 1 to December 3, 2014 reply brief filed by Chickaloon.

Myers concluded only that there could be significant water reduction in Moose Creek during two seasons, not that there would be or is now.

The requestors have raised a number of concerns about water quality and quantity, and fisheries protection, but their focus is on possible future non-compliance. Because the law limits the circumstances under which the commissioner can deny a permit renewal, however, opinions about what “could” happen in the future are not proof of non-compliance.

Recommendation: The commissioner should find that the requestors failed to meet the applicable burden of proof and affirm the division’s decision to renew Usibelli’s permits.

C. Water Rights

Chickaloon has an instream flow reservation application in for Moose Creek dating back to 2009. In 2011, Usibelli applied to the division’s water section for authority for a small diversion of water from Buffalo Creek, which sometimes supplies water to flow to Moose Creek. Under 11 AAC 90.125(a)(3), it is required before the commissioner will approve a permit application or a major revision that the “applicant has assured that disturbances to the hydrologic balance will be minimized [and] the water rights of present users will be protected...” This pre-approval assurance requirement is for new permits and major revisions, not renewals.¹⁵

“Nothing in [title 27, chapter 21] may be construed to affect the right of a person to protect the person’s interest in water resources affected by a surface coal mining operation.”¹⁶ But this does not mean that an existing, permitted coal mine cannot go forward with a permit renewal in a

¹⁵ “[A] permit revision will be considered major when the revision constitutes a significant departure from the original permit, such as a change in permit area or the method of conducting mining or reclamation operations which would significantly change the effect of the operation on persons or the environment.” 11 AAC 90.129(a)(2). Requestors characterized the renewal changes as a major revision, explaining that the division and Usibelli referred to them as “extensive.” (Page 18 of Castle Mountain’s brief.) That is not the test under section 129(a)(2). Requestors have not supported the contention that this could be a “major revision” rather than renewal situation.

¹⁶ AS 27.21.930(a).

timely way because another is pursuing interest in water resource at or near the mine site. The interest, whether a perfected water right or something less—a pending application perhaps—the permit renewal review process can accommodate the interest holder’s participation without the renewal being derailed by the pendency of the water right adjudication.

Chickaloon is understandably concerned about protection of Moose Creek and its flow. The tribe has been involved in habitat restoration in the area. The renewal review process has allowed them the opportunity to raise water right concerns along with others. They have not shown that their status as

Recommendation: The commissioner should reject requestors’ request that this matter be remanded to the division for completion of the water rights adjudication before the renewal is finally decided.

D. Government-to-Government Consultation

Chickaloon has asked that the commissioner withdraw Usibelli’s permits and that the department “should work in direct, government-to-government consultation with the tribe.”¹⁷ The tribe asserts that it “is entitled to full governmental consultation and special consideration.”¹⁸ The briefing does not explain why, in this particular permit renewal matter, participation in public meetings and submitting extensive written comments was insufficient. The tribe’s briefing does object to the department’s release of draft permit documents for public comment without first consulting it.¹⁹ The same objection was made in Chickaloon’s 18-page comment letter.²⁰ It seems

¹⁷ Chickaloon’s December 3, 2014 Opening Brief at p. 14.

¹⁸ *Id.* at p. 7.

¹⁹ *Id.*

²⁰ November 15, 2011 Letter from Harrison (Chickaloon Executive Director) to Kirkham (DNR) at DMLW at p. 009068.

as if the tribe wants early, pre-document drafting consultation so that it can have input before the general public learns of specific changes that may be needed to the existing mine's stipulations.

This is a renewal, not a new application for a not-yet-approved mining operation. The law limits the circumstances under which a permittee who has “the right of successive renewal ... for areas within the boundaries of the permit area” can be denied a renewal.²¹ Unlike a wholly new permit application for which lots of information needs to be gathered, and early consultation with stakeholders having specialized local knowledge can be quite helpful, a renewal requires a more focused look at how the mine has been operating and what stipulations may need to be added or changed.

Producing draft documents for commenters to focus on can be extremely helpful in permit renewals and is common practice—not just in land use and environment permits either. For instance, this is routine with renewals for health care facilities. Whether for a big hospital or a tiny assisted living home, if it is time for renewal and the facility is subject to stipulations, looking at draft stipulations before commenting can generate good, concrete suggestions. The same is true for renewals of mine permits such as Wishbone Hill's. As much as anything else, this practice is a courtesy to commenters, to make their efforts to comment more effective.

Use of this practice for Wishbone Hill Mine is within the division's discretion to structure the public process to fit the specific project. It should not be taken show disrespect to anyone. As a general matter, a department head like the commissioner need not defer to his subordinates, but often will defer in areas of staff expertise.²² In this matter of tribal consultation, which is part

²¹ See AS 27.21.080(a).

²² *In re: Rockstad*, OAH No. 08-0282-DEC at p. 5 & n.38 (Commissioner Environmental Conservation 2008) (deferring to division director's decision on penalty for drinking water system violation).

policy and part practicality of how and when best to gather information and feedback, the commissioner could decide on a different kind or degree of consultation for permit renewals generally, or for these permits specifically. But what he cannot do is reverse, reopen or otherwise deny the renewal, to change the consultation approach at this time, through this case, unless he has found grounds to do so under AS 27.21.080(b).

Recommendation: If the commission adopt the recommendation in Section III.B, which is to find no ground for denying the Wishbone Hill mine permit renewals under AS 27.21.080(b), the recommendation for this consultation issue is that Chickaloon Village Traditional Council's request to return this matter to the division for more consultation be DENIED.²³

IV. Conclusion

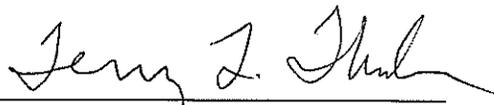
Requestors rail against the limitations placed on denying a permit renewal. They tried to have Usibelli's permits invalidated based on interpretation of the statute requiring commencement of operations within three years of permit issuance. Their interpretation is plausible but strained insofar as they tried to read the word "automatically" into the statute. The requestors tried also to make the case for denying the renewal based on environmental protection standards but did not meet their burden of proof. They showed the potential for future water flow problems but the law on denying permit renewals is not satisfied by speculation. Also, the division imposed new monitoring requirements and stipulations to address some of these concerns.

²³ Chickaloon's opening brief (at p. 8) asserts that the permits "must be reopened and may not be reissued" until the consultation they seek "determines that the Mine will comply with all legal requirements." They cited no authority for the division to force such a reopener on a permittee and landowner, and the hearing officer found none either. If the commissioner's decision is different than recommended in Section III.B above, it might have the effect of a "reopener" but likely only of the renewal application or some subset of renewal issues, not the permits themselves.

Requestors urged more process, such as more consultation with Chickaloon and completion of a water rights adjudication, before final decision on the renewal. Because it is a renewal of existing permits, those lengths are not called for here. The public meeting and comment process generated much information, including from requestors, the division could use in crafting stipulations for the renewed permits.

This Recommended Decision concludes that the requestors have not succeeded in proving invalidity of the permits or that the commissioner should deny the renewals. The division's decision should be affirmed.

March 17, 2015


By: Terry L. Thurbon, Hearing Officer